

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII 726 MINNESOTA AVENUE KANSAS CITY, KANSAS 66101

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June 6, 1995

FEDERAL EXPRESS

J. Brian Molloy, Esq. Piper & Marbury 1200 Nineteenth Street, N.W. Washington, D.C. 20036-2430

Re: Pacific Activities, Ltd.

626 Schmidt Road Davenport, Iowa

Dear Brian:

Enclosed you will find a copy of the fully executed and filestamped Administrative Order on Consent pertaining to the abovereferenced matter. Pursuant to Section XXV of the Order, the Order's effective date is the date on which the Order was signed by the Director of Region VII's Superfund Division, which was June 1, 1995.

I have not included a copy of Attachment II (the Workplan) with the Order, as we only have two copies, one of which is Jeff Weatherford's working copy, and the other was filed with the Regional Hearing Clerk along with the Order.

Thank you for your efforts is getting this aspect of this matter concluded in a timely and amicable manner. I look forward to working with you, Curt Beason, and PAL during the course of this matter.

Sincerely,

Assistant (Refional Counsel Office of Regional Counsel

cc: Curtis Beason, Esq. Jeff Weatherford, SUPR/SARS

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SUPERFUND RECORDS

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REGION VII

726 MINNESOTA AVENUE

KANSAS CITY, KANSAS 66101

JUN 0 6 1995 Environmental Protection Agency

IN THE MATTER OF:

PACIFIC ACTIVITIES, LTD. 626 SCHMIDT ROAD DAVENPORT, IOWA

Docket No.

VII-95-F-0008

Respondent.

Proceeding under Section 106(a) of the Comprehensive Environmental Response Compensation and Liability Act, as amended, 42 U.S.C. § 9606(a).

ADMINISTRATIVE ORDER ON CONSENT

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ATTACHMENT III - DECLARATION OF COVENANTS AND RESTRICTIONS

. I. JURISDICTION AND GENERAL PROVISIONS

- 1. This Administrative Order on Consent ("Consent Order") is entered into voluntarily by the United States Environmental Protection Agency ("EPA") and Pacific Activities, Ltd., an Illinois corporation ("PAL"). This Consent Order provides for the performance of the removal action by PAL and the reimbursement of response costs incurred by the United States in connection with property owned by PAL located at 626 Schmidt Road, Davenport, Iowa (the "Site").
- 2. This Consent Order is issued pursuant to the authority vested in the President of the United States by Section 106(a) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9606(a), as amended, and delegated to the Administrator of EPA by Executive Order No. 12580, dated January 23, 1987, 57 Fed. Reg. 2,923. This authority was further redelegated to the Regional Administrators of EPA by EPA Delegation Nos. 14-14-A, dated April 16, 1984, and 14-14-C, dated September 13, 1987, and to the Director of EPA Region VII's Waste Management Division by EPA Delegation No. R7-14-14C, dated May 16, 1988.
- 3. EPA has notified the State of Iowa of this action pursuant to Section 106(a) of CERCLA, 42 U.S.C. § 9606(a).
- 4. EPA and Respondent agree to comply with and be bound by the terms of this Consent Order. Respondent further agrees that it will not contest the basis or validity of this Consent Order or its terms. Respondent reserves its rights to contest the meaning of

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terms in this Consent Order in accordance with Section XV hereof (Dispute Resolution), and in the event that proceedings are initiated to enforce this Consent Order, in such proceedings.

5. By entering into this Consent Order, the objectives of EPA and Respondent are: (a) the performance of a time-critical removal action at the Site designed to protect public health and welfare and the environment and reduce or eliminate any hazard posed to public health by the exposure to workers and others on or near the Site to dust inhalation and ingestion of hazardous substances present in the Site soil; and (b) the recovery by EPA of response and oversight costs incurred by EPA with respect to the Site.

II. PARTIES BOUND

- 6. This Consent Order applies to and is binding upon Respondent and Respondent's successors and assigns. No change in ownership or corporate status of Respondent including, but not limited to, any transfer of assets or real or personal property shall in any way alter Respondent's responsibilities under this Consent Order.
- 7. Respondent shall ensure that its contractors, subcontractors, and representatives receive a copy of and comply with this Consent Order. Respondent shall be responsible for any noncompliance with this Consent Order.

III. FINDINGS OF FACT

EPA has determined that:

- 8. PAL is an Illinois corporation authorized to transact business in the State of Iowa.
- 9. From 1938 until 1954 a portion of the Site was owned by Davenport-Bessler Corporation and operated as a diesel locomotive manufacturing foundry. From 1954 until 1964 A.G.S. Associates, an Iowa general partnership, owned the Site. During part of A.G.S. Associates' ownership, the Site was leased to Alter Company, an Iowa corporation. Alter Company operated a scrap metal processing and alloy metal production/fabrication business at the Site during the period of the lease.
- 10. The Site was acquired by Sherman Industries, Inc., an Iowa corporation, in 1964. The Site was then leased by Sherman Industries, Inc. to Alloy Metal Products, Inc. ("AMPI"), an Iowa corporation. From 1964 until late 1987 AMPI conducted smelting operations for the production of nickel alloys at the Site. AMPI purchased various grades of nickel alloy scraps in the form of grindings, turnings, solids, borings, catalysts, flue dusts, and sludges. These scraps were subsequently melted in electric arc furnaces, poured into 35-50 pound "pigs", and then sold as nickel additive. When these scraps were melted, flue dust was collected in an emission control dust collection system connected to the furnace. AMPI would collect the flue dust (commonly referred to as "baghouse dust") and store it on-Site until it could be recycled back into the nickel "pig" process. In May of 1987 AMPI filed a

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voluntary bankruptcy petition under Chapter 7 of the United States Bankruptcy Code (Title 11 of the United States Code). An EPA inspection of the Site conducted in November 1988, revealed that there was a large quantity of baghouse dust containing lead, nickel, cadmium, and other heavy metals on-Site. On March 15, 1989 Respondent acquired the Site from the AMPI bankruptcy estate.

- 11. EPA conducted a sampling investigation of the Site in October 1993 in an effort to ascertain the extent of contamination at the Site. The following is a summary of such sampling investigation:
 - Twenty-four waste piles totalling approximately 231.5 cubic yards were identified. Eleven of the twentyfour waste piles tested hazardous for cadmium by the toxicity characteristic leaching procedure ("TCLP"). Nine of the twenty-four waste piles tested hazardous for lead by the TCLP. The total lead values for the eighteen waste piles which exceeded 500 mg/kg ranged from 570 to 160,000 mg/kg with the average lead concentration per waste pile being approximately 14,090 mg/kg. cadmium values for the twenty-two waste piles which exceeded 40 mg/kg ranged from 46 to 2,400 mg/kg with the average cadmium concentration per waste pile being approximately 156 mg/kg. The total nickel values for the twenty-two waste piles which exceeded 2,000 mg/kg ranged from 3,800 to 120,000 mg/kg with the average nickel concentration being approximately 21,458 mg/kg.

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 b_{\bullet} Floor sweepings taken from the inside of a building located on-Site tested hazardous for cadmium and lead by the TCLP. Floor sweepings taken from the inside of such building contained up to 1,500 mg/kg total cadmium, 72,000 mg/kg total nickel, and 140,000 mg/kg total lead. Seventy-three samples, 28 from the approximate 0' to 1.5' interval and 45 from the approximate 1.5' to 10' interval, from 40 Sitewide borings were taken and analyzed. Sixteen of the twenty-two samples analyzed for cadmium by the TCLP tested hazardous for cadmium. Eleven of the twenty-two samples analyzed for lead by the TCLP tested hazardous for lead. Seventeen of the twenty-eight approximate 0' to 1.5' interval samples taken contained cadmium levels above the currently recognized soil cadmium remediation level of 40 mg/kg. The total cadmium levels for the seventeen samples which exceeded 40 mg/kg ranged from 41 to 2,400 mg/kg with the average cadmium concentration being approximately 305 mg/kg. three of the twenty-eight approximate 0' to 1.5' interval samples taken contained lead levels above the currently recognized soil lead remediation level of 500 mg/kg. The total lead levels for the twenty-three samples which exceeded 500 mg/kg ranged from 520 to 49,000 mg/kg with the average lead concentration being approximately 4,971 Fifteen of the twenty-eight approximate 0' to 1.5' interval samples taken contained nickel levels above the currently recognized soil nickel remediation level of 2,000 mg/kg. The total nickel levels for the fifteen samples which exceeded 2,000 mg/kg ranged from 2,300 to 42,000 mg/kg with the average nickel concentration being approximately 9,377 mg/kg. Six of the forty-five approximate 1.5+' interval samples taken contained nickel levels above the currently recognized soil nickel remediation level of 2,000 mg/kg. The total nickel levels for the six samples which exceeded 2,000 mg/kg ranged from 2,800 to 26,000 mg/kg with the average nickel concentration being approximately 1,731 mg/kg. Eleven of the forty-five approximate 1.5+' interval samples taken contained lead levels above the currently recognized soil lead remediation level of 500 mg/kg. The total lead levels for the eleven samples which exceeded 500 mg/kg ranged from 530 mg/kg to 48,000 mg/kg with the average lead concentration being approximately 2,300 mg/kg.

12. The area immediately surrounding the Site is zoned industrial/commercial, however, there is a residential area located less than 500 feet to the north of the Site. Although the Site is fenced and gated, EPA personnel have observed children occasionally playing on the Site. In addition, there is a school and church located approximately 1,500 feet to the east of the Site, and a school located approximately 3,500 feet to the north of the Site. The southeast portion of the Site is currently open to the public

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as a local community recycling drop on Thursdays, Fridays, and Saturdays.

- 13. Lead is present in Site soils in significant quantities. EPA has classified lead as a Class B2 probable human carcinogen. Lead can be toxic to humans and animals by ingestion and inhalation. Human exposure to lead may result in: premature births; smaller babies; decreased mental ability; decreased growth in children; decreased reaction time; weakness in fingers, wrists, and ankles; increased blood pressure; anemia; kidney damage; and reproductive system damage.
- 14. Cadmium is present in Site soils in significant quantities. EPA has classified cadmium as a Class B1 probable human carcinogen. Cadmium can be toxic to humans and animals by ingestion and inhalation. Human exposure to cadmium may result in: lung damage; kidney damage; stomach irritation; diarrhea; high blood pressure; and iron poor blood.
- 15. Nickel is present in Site soils in significant quantities. EPA has classified nickel refinery dust as a Class A human carcinogen. Nickel can be toxic to humans and animals by ingestion and inhalation. Human exposure to nickel may result in cancer of the lung and nasal sinuses in humans, and an allergic reaction that results in skin rashes and asthma.
- 16. The principal hazard posed to human health by the hazardous substances located in the Site soils is toxic exposure to workers and others on or near the Site by dust inhalation and ingestion.

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IV. CONCLUSIONS OF LAW AND DETERMINATIONS

Based upon the Findings of Fact set forth above, EPA has determined and concluded that:

- 17. The Site is a "facility" as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).
- 18. The contaminants found at the Site, as identified in the Findings of Fact above as lead, cadmium and nickel, are "hazardous substances" as defined by Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).
- 19. Respondent is a "person" as defined by Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).
- 20. Respondent is liable under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), as it is the "owner" of the Site, as defined by Section 101(20) of CERCLA, 42 U.S.C. § 9601(20), and within the meaning of Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1).
- 21. The conditions described in the Findings of Fact above constitute an actual or threatened "release" of a hazardous substance from the facility as defined by Section 101(22) of CERCLA, 42 U.S.C. § 9601(22).
- 22. The actual or threatened release of hazardous substances from the Site may present an imminent and substantial endangerment to the public health, welfare, or the environment within the meaning of Section 106(a) of CERCLA, 42 U.S.C. § 9606(a).
- 23. The actions required by this Consent Order are necessary to protect the public health, welfare, or the environment, and are

consistent, with CERCLA and the National Oil and Hazardous Substances Pollution Contingency Plan ("NCP"), 40 C.F.R. Part 300.

V. ORDER ON CONSENT

Based upon the foregoing Findings of Fact, Conclusions of Law and Determinations, it is hereby ordered and agreed that Respondent shall comply with the following provisions, including but not limited to all attachments to this Consent Order, and all documents incorporated by reference into this Consent Order, and perform the following actions:

Work to Be Performed

- 24. Respondent shall conduct a removal action at the Site in accordance with the provisions and schedule set forth in the Removal Action Workplan ("RAW") which is attached hereto as Attachment II, and incorporated herein. If EPA determines that the response action provided for in the RAW is not adequately protective of public health, welfare, or the environment, it may require revisions to, or modify the RAW. In the event that EPA determines that minor revisions are necessary to the RAW to make it adequately protective of public health, welfare, or the environment, Respondent shall make such revisions upon notification by EPA of the required revisions.
- 25. Respondent shall notify EPA at least seven (7) days prior to commencing any on-Site work pursuant to the RAW. Respondent shall not commence or undertake any removal action on-Site without prior EPA approval.

Designation of Contractor and Project Coordinators

All activities performed pursuant to this Consent Order (the "Work") shall be under the direction and supervision of qualified personnel. Within twenty-one (21) days ("days", as used herein, shall refer to calendar days) of the effective date of this Consent Order, and before the Work begins, Respondent shall notify EPA in writing of the names, titles, and qualifications of the principal personnel, including contractors, subcontractors, consultants, and laboratories, to be used in carrying out the Work. The qualifications of the persons responsible for undertaking the Work shall be subject to EPA's review, for verification that such background minimum technical and requirements. This Consent Order is contingent upon Respondent's demonstration to EPA's satisfaction that Respondent is qualified to perform properly and promptly the actions set forth in this Consent If EPA disapproves of the technical qualifications of any person, Respondent shall notify EPA of the identity qualifications of a replacement within twenty-one (21) days of receipt of EPA's disapproval. If EPA disapproves of replacement, EPA reserves the right to terminate this Consent Order and to conduct the Work (or any portion thereof), and/or seek reimbursement for costs and penalties from Respondent. During the course of the performance of the Work, Respondent shall notify EPA in writing of any changes or additions in the principal personnel used to carry out the Work, including their names, titles, and qualifications. EPA shall have the same right to approve changes

and additions to principal personnel as it has hereunder regarding the initial notification.

- 27. Within five (5) days after the effective date of this Consent Order, Respondent shall designate a Project Coordinator who shall be responsible for the administration of all of Respondent's actions required by the Consent Order. Respondent shall submit the Project Coordinator's name, address, telephone number, and qualifications to EPA. To the greatest extent possible, the Project Coordinator shall be present on-Site or readily available during Site work. EPA retains the right to disapprove of any Project Coordinator named by Respondent. If EPA disapproves of a selected Project Coordinator, Respondent shall retain a different Project Coordinator and shall notify EPA of that person's name, address, telephone number, and qualifications within twenty-one (21) days following EPA's disapproval. Receipt by Respondent's Project Coordinator of any written notice or written communication from EPA relating to this Consent Order shall constitute receipt by Respondent.
- 28. EPA has designated Jeffrey Weatherford, P.E., of EPA Region VII's Superfund Division, as its Project Coordinator. All submissions required by this Consent Order to be made to EPA shall be sent by certified mail, return receipt requested, overnight delivery service, or hand delivered to EPA's Project Coordinator at the following address:

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Jeffrey Weatherford, P.E. U.S. Environmental Protection Agency Superfund Division 726 Minnesota Avenue Kansas City, Kansas 66101

- 29. EPA's Project Coordinator shall be responsible for overseeing Respondent's implementation of this Consent Order. EPA's Project Coordinator shall have the authority vested in an onscene coordinator by the NCP, including the authority to halt, conduct, or direct any work required by this Consent Order, or to direct any other removal action undertaken at the Site. The absence of EPA's Project Coordinator from the Site shall not be cause for stoppage of work unless specifically directed by EPA.
- 30. EPA and Respondent shall each have the right, subject to paragraph 27 above, to change their respective Project Coordinators. The other party must be notified in writing at least ten (10) days prior to any such change.

Health and Safety Plan

31. Within thirty (30) days after the effective date of this Consent Order, Respondent shall submit to EPA for review and comment a plan that ensures the protection of the public health and safety during the performance of the Work. This plan shall be prepared in accordance with 40 C.F.R. § 300.150.

Quality Assurance and Sampling

32. All sampling and analyses performed pursuant to this Consent Order shall conform to EPA direction, approval, and guidance regarding sampling, quality assurance/quality control ("QA/QC"), data validation, and chain of custody procedures.

Respondent shall ensure that all laboratories used by it to perform analyses under this Consent Order participate in a QA/QC program that complies with all applicable EPA guidance. Respondent shall follow the following documents, as appropriate, as guidance for QA/QC and sampling: "Quality Assurance/Quality Control Guidance for Removal Activities: Sampling QA/QC Plan and Data Validation Procedures," OSWER Directive Number 9360.4-01; "Environmental Response Team Standard Operating Procedures," OSWER Directive Numbers 9360.4-02 through 9360.4-08.

- 33. Upon request by EPA, Respondent shall, at its expense, have any laboratory used by it for the analysis of samples pursuant to this Consent Order analyze samples submitted by EPA for quality-assurance monitoring. Respondent shall provide to EPA the quality assurance/quality control procedures followed by all sampling teams and laboratories performing data collection and/or analysis under this Consent Order.
- 34. Upon request by EPA, Respondent shall allow EPA or its authorized representatives to take split and/or duplicate samples of any samples collected by Respondent while performing the Work. Respondent shall notify EPA not less than seven (7) days in advance of any such sample collection activity. EPA shall have the right to take any additional samples that it deems necessary.

Off-Site Shipments

35. All hazardous substances, pollutants or contaminants removed from the Site pursuant to this Consent Order for treatment, storage or disposal shall be treated, stored, or disposed of at a

facility approved by EPA, and in compliance, as determined by EPA, with Section 121(d)(3) of CERCLA, 42 U.S.C. § 9621(d)(3), and the Off-Site Rule, 40 C.F.R. § 300.440.

EPA Approvals

36. All approvals by EPA required by this Consent Order will not be unreasonably withheld.

VI. ADDITIONAL WORK

EPA may determine that in addition to tasks defined in the EPA-approved RAW, other additional work may be necessary to accomplish the objectives of this Consent Order. EPA may request that Respondent perform these response actions in addition to those required by the RAW including any approved modifications if it determines that such actions are necessary for a complete response Respondent shall confirm its willingness to perform the additional work in writing to EPA within seven (7) days of receipt of the EPA request or Respondent shall invoke dispute resolution. Subject to resolution of any dispute, Respondent shall implement the additional tasks which EPA determines are necessary to achieve the objectives of this Consent Order. The additional work shall be completed according to the standards, specifications, and schedules set forth or approved by EPA in a written modification to the RAW. In the event Respondent does not agree to perform the additional work, EPA reserves the right to conduct the work itself, to seek reimbursement from Respondent, and/or to seek any other appropriate relief.

VII. PROGRESS REPORTS

38. Respondent shall submit weekly progress reports to EPA by Wednesday of each following week beginning the second full week after the effective date of this Consent Order. At a minimum, with respect to the preceding week, these progress reports shall: (1) describe the actions which have been taken to comply with this Consent Order during the reporting period; (2) include all results of sampling and tests and all other data relating to this Consent Order and received by Respondent during the reporting period; and (3) describe work planned for the next two weeks.

VIII. FINAL REPORT

39. Within sixty (60) days after completion of all removal actions required under this Consent Order, Respondent shall submit to EPA for review and approval a final report summarizing the actions taken to comply with this Consent Order. The final report shall include a good faith estimate of total costs or a statement of actual costs incurred in complying with the Consent Order, a listing of quantities and types of materials removed from the Site or handled on-Site, a listing of the ultimate destination of any hazardous substances removed from the Site, a presentation of the analytical results of all sampling and analyses performed, and accompanying appendices containing all relevant documentation generated during the removal action (e.g., manifests, invoices, bills, contracts, and permits). The final report shall also include the following certification signed by a person who supervised or directed the preparation of that report:

Under penalty of law, I certify that to the best of my knowledge, after appropriate inquiries of all relevant persons involved in the preparation of the report, the information submitted is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

IX. DEED RESTRICTIONS

40. Within thirty (30) days of EPA's approval of the final report or prior to Respondent's transfer of the Site (or any portion thereof) to a third party, whichever occurs earlier, Respondent shall record with the office of the recorder of deeds for Scott County, Iowa, a Declaration of Covenants and Restrictions in the form identical to Attachment III to this Consent Order. Each subsequent instrument conveying any interest in the Site shall reference such recorded Declaration of Covenants and Restrictions.

X. EMERGENCY RESPONSE AND NOTIFICATION

41. If any incident, or change in Site conditions, during the performance of the Work causes or threatens to cause an immediate threat to public health or welfare or the environment, Respondent shall immediately take all appropriate action to prevent, abate or minimize such threat. Respondent shall also immediately notify EPA's Project Coordinator at (913) 551-7695, and if EPA's Project Coordinator is unavailable, the EPA Region VII Duty Officer at (913) 236-3778. In addition, Respondent shall submit a written report to EPA within seven (7) days after such incident, or change in Site conditions, setting forth the events that occurred and the measures taken or to be taken to mitigate any threat. This reporting requirement is in addition to, not in lieu of, reporting

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required pursuant to Section 103(c) of CERCLA, 42 U.S.C. § 9603(c), and Section 304 of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. § 11004.

42. Nothing in the preceding paragraph shall be deemed to limit any authority of the United States to take, direct, or order all appropriate action to protect human health and the environment.

XI. ACCESS

- 43. Commencing upon the effective date of this Consent Order, Respondent agrees to provide EPA and its representatives, including its contractors, access at all reasonable times to the Site and any other property to which access is required for the implementation of this Consent Order, to the extent access to the property is controlled by Respondent, for the purposes of conducting any activity related to this Consent Order including, but not limited to:
 - a. Monitoring the Work;
 - b. Verifying any data or information submitted to EPA;
 - c. Conducting investigations relating to contamination at or near the Site;
 - d. Obtaining samples;
 - e. Assessing the need for, planning, or implementing additional response actions at or near the Site;
 - f. Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by Respondent or its agents; and

- g. Assessing Respondent's compliance with this Consent
 Order.
- To the extent that the Site or any other property to which access is required for the implementation of this Consent Order and its objectives is owned or controlled by persons other than Respondent, Respondent shall use best efforts to secure from such persons access for Respondent, as well as for EPA and its representatives, including, but not limited to, its contractors. For the purposes of this paragraph, "best efforts" includes offering to provide reasonable consideration to the owner of property for which access is required to perform the Work. access required to complete the Work is not obtained within thirty (30) days of the effective date of this Consent Order, or within thirty (30) days of the date EPA notifies Respondent in writing that additional access beyond that previously secured is necessary, Respondent shall promptly notify EPA, and shall include in that notification a summary of the steps Respondent has taken to attempt to obtain access. EPA may, as it deems appropriate, assist Respondent in obtaining access. Respondent shall reimburse EPA, in accordance with the procedures in Section XIV (Reimbursement of EPA's Costs), for all costs incurred by EPA in obtaining access.
- 45. Notwithstanding any provision of this Consent Order, EPA retains all of its access authorities and rights, including enforcement authorities related thereto, under CERCLA and any other applicable statutes or regulations.

XII. RECORD PRESERVATION

- 46. One complete set of all non-privileged records and documents in Respondent's possession that relate to this Consent Order shall be preserved while this Consent Order is in effect and for a minimum of six (6) years after the termination of this Consent Order. Respondent shall acquire and retain copies of all non-privileged records and documents that relate to this Consent Order that are in the possession of their employees, agents, accountants, contractors, or attorneys. At the conclusion of this six (6) year period, Respondent shall notify EPA at least ninety (90) days prior to the destruction of any such records and documents, and, upon EPA's request, Respondent shall deliver any such records or documents to EPA.
- 47. If Respondent asserts that any records or documents are privileged under the attorney-client privilege, or any other privilege recognized by federal or state law, it shall provide the following information to EPA: (a) the title of the record or document; (b) the date of the record or document; (c) the names and titles of the author(s) and recipient(s) of the record or document; (d) a description of the contents of the record or document; and (e) the privilege asserted.
- 48. Respondent may assert a confidentiality claim pursuant to 40 C.F.R. Part 2 with respect to part or all information submitted to EPA pursuant to this Consent Order, provided such claim is allowed by Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7).

XIII. FINANCIAL ASSURANCE

49. Respondent has agreed to enter into an irrevocable standby trust agreement establishing a trust fund in the amount of the estimated cost of implementing this Consent Order, naming EPA as the beneficiary, and has provided a copy of this trust agreement to EPA. If Respondent fails to complete the removal action required by this Consent Order, EPA may complete same utilizing the trust fund.

XIV. REIMBURSEMENT OF EPA'S COSTS

- 50. Respondent has received a final accounting in the form of a Regional Cost Summary from EPA of response costs incurred with respect to the Site for the period prior to April 4, 1995 ("Past Response Costs"), Respondent shall remit a certified or cashier's check to EPA payable in that amount within thirty (30) days of the effective date of this Consent Order.
- 51. Following the effective date of this Consent Order, EPA will periodically submit to Respondent an accounting of all response costs including oversight costs incurred by EPA with respect to this Consent Order ("Future Response Costs"). Future Response Costs shall include all of EPA's direct and indirect costs relating to the Site incurred after April 4, 1995, including, but not limited to, time and travel costs of EPA personnel, contractor costs, costs in overseeing Respondent's implementation of the requirements of this Consent Order and activities performed by EPA relating to this Consent Order, and any costs incurred while

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assisting Respondent in obtaining access and costs of redoing any of Respondent's tasks.

- 52. Interest at the rate specified for investments for the Hazardous Substances Superfund shall begin to accrue on any unpaid balance on the thirty-first (31st) day following Respondent's receipt of EPA's accounting.
- 53. All payments to EPA under this Section shall be made by certified or cashier's check made payable to "EPA Hazardous Substance Superfund" and shall include the Site name, the EPA Site identification number SJ, and the EPA Docket Number assigned to this matter, and shall be remitted to:

Mellon Bank
Attn: Superfund Accounting
EPA Region VII
(Comptroller Branch)
Post Office Box 360748M
Pittsburgh, PA 15251

- 54. A copy of the check shall be sent simultaneously to EPA's Project Coordinator.
- 55. Respondent shall identify any contested costs and the basis of its objection. All undisputed costs shall be remitted by Respondent in accordance with the time frame set forth above. Disputed costs shall be paid by Respondent into an escrow account while the dispute is pending. Respondent bears the burden of establishing erroneous or improper charges.

XV. DISPUTE RESOLUTION

56. If Respondent objects to any EPA notice of disapproval or requirement made pursuant to this Consent Order, Respondent shall notify EPA's Project Coordinator in writing of its objections

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within fourteen (14) days of receipt of the such notice or requirement. Respondent's written objections shall define the dispute and state the basis of Respondent's objections. Within fourteen (14) days of receipt of Respondent's objection, EPA will respond to Respondent in writing, specifically addressing the points raised by Respondent and identifying points of agreement or disagreement. EPA and Respondent then have an additional fourteen (14) days to reach agreement.

57. If agreement is not reached within the final fourteen (14) day period referenced above, Respondent may request a determination by the Division Director of EPA Region VII's Superfund Division (the "Superfund Division Director"), who will resolve the dispute and provide a written statement of his/her decision to the parties. Respondent shall proceed in accordance with the Superfund Division Director's decision regarding the matter in dispute, unless Respondent invokes the alternative dispute resolution procedures set forth below. Notwithstanding the invocation of mediation as set forth below, Respondent shall proceed to take any action required by those portions of this Consent Order that EPA determines are not substantially affected by the dispute.

58. Respondent may make a written request for mediation within five (5) days following the issuance of the Superfund Division Director's decision as provided for in the preceding paragraph if such decision involves a "mediated matter" as defined in paragraph 59 below. In the event of such a request, the parties

agree to follow the procedures set forth in paragraphs 59 through 66 below.

- 59. For the purposes of this section, matters that may be subject to mediation ("mediated matters") are: (1) the need for additional work beyond that required by the RAW and Section V (Order on Consent) of this Consent Order, costing an additional \$50,000 or more; (2) the existence of a force majeure event pursuant to Section XVI (Force Majeure) of this Consent Order; and (3) the approval by EPA of Respondent's certification of completion as provided for in paragraph 93 below. Respondent may invoke the mediation process no more than three (3) times during the pendency of this Order.
- 60. EPA and Respondent agree that they will equally share the costs of mediation. EPA's Project Coordinator will notify Respondent of EPA's ability to share equally the costs of mediation within five (5) days of EPA's receipt of Respondent's request for mediation. This time period may be extended by the EPA Project Coordinator if necessary to determine the availability of EPA funds to share the costs of mediation. EPA's ability to share the costs of mediation will be determined by EPA in its sole discretion and shall not be subject to dispute resolution or judicial review. Upon written notice by EPA's Project Coordinator to Respondent that EPA cannot equally share the costs of mediation, the Superfund Division Director's decision shall be incorporated into and become an enforceable part of this Consent Order. If EPA notifies

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Respondent that it can equally share the expenses of mediation then the parties shall follow the procedures below.

- 61. If the parties use EPA's Dispute Resolution Support Services Contract they agree to select a mediator in accordance with the following procedures:
 - (a) Upon receipt of Respondent's request for mediation, and following EPA's notification that it can share the expenses of mediation, the parties will be forwarded a list of mediators (the "Mediator Selection List") available through the Dispute Resolution Support Services Contract managed by EPA.
 - (b) Within five (5) days of Respondent's receipt of the Mediator Selection List, the parties shall simultaneously provide to each other a letter (the "Mediator Nomination Letter") which shall contain the names of five (5) persons from the Mediator Selection List nominated to serve as mediators for the Mediated Matter in dispute.
 - (c) The mediators nominated by each party must not have any present or planned future business relationships with the parties, other than for mediation activities. They must also agree to the terms and conditions for mediation contained in this Consent Order and enter into an agreement for the provision of alternative dispute resolution services with the parties. All persons nominated shall be provided with a copy of this Consent Order by the nominating party. Any conflicts of interest or refusal to comply with paragraphs 64 and 65 of

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this section shall automatically result in the rejection of said nominee.

(d) Within five (5) days of the receipt of the Mediation Nomination Letters, each party shall advise the other in writing of acceptable nominees. All acceptable nominees who are not automatically rejected pursuant to subparagraph (c) above, shall comprise the Mediator Nomination List. The parties shall select a mediator from the Mediator Nomination List and enter into an agreement for mediation services with such mediator through negotiation and by mutual consent within twenty (20) days of the receipt of the Mediation Nomination Letters.

Alternatively, the parties may select a mediator from any other source of mediators. In this event, the provisions of paragraph 61(c) shall continue in effect.

- 62. The parties agree that the time period for mediation of the matter in dispute is limited to thirty (30) days from the date the parties sign an agreement with a Mediator. This time period may be extended by mutual consent of the parties.
- 63. If for any reason the parties are unable to select a mediator, or are unable to approve and execute an agreement for mediation services, or are unable to complete mediation, within the time periods for those activities specified in paragraphs 61 and 62 above, the Superfund Division Director's decision shall be incorporated into and shall become an enforceable part of this Order upon the expiration of such time period.

- 64. Unless the parties agree otherwise in writing, the mediator's role shall be limited to facilitating negotiation between the parties. Mediation sessions shall not be recorded verbatim and no formal minutes or transcripts shall be maintained. Unless the parties agree otherwise, the mediator shall make no written findings or recommendations.
- treated as confidential settlement negotiations. Statements made by any person during any such meetings or conferences shall be deemed to have been made in compromise negotiations within the meaning of Rule 408 of the Federal Rules of Evidence and applicable state rules of evidence, and shall not be offered in evidence in any proceeding by any person. The mediator will be disqualified as a witness, consultant or expert in any pending or future action relating to the subject matter of the mediation, including those between persons not a party to the mediation. If Respondent fails to comply with the mediation confidentiality requirements of this section, then it will forfeit its rights, if any remain, under this Consent Order to request future mediation and may be responsible for stipulated penalties for such breach as provided in Section XVII (Stipulated/Statutory Penalties).
- 66. Any agreement to resolve the dispute reached by the parties pursuant to this section shall be in writing and shall be signed by both parties. The written agreement shall specify what portions of the Superfund Division Director's decision are superseded and/or modified. If the written agreement is not signed

by Respondent within seven (7) days after the resolution of the dispute it shall be null and void and the Superfund Division Director's decision shall be incorporated into and become an enforceable part of this Consent Order.

- 67. No action, decision, or directive made by EPA, including without limitation the Superfund Division Director pursuant to this Consent Order shall constitute final agency action giving rise to any rights to judicial review prior to EPA's initiation of judicial action to compel Respondent's compliance with this Consent Order.
- and conduct activities and submit deliverables in accordance with the schedule set forth in this Consent Order while a matter is pending in dispute resolution. The invocation of dispute resolution does not stay stipulated penalties under this Consent Order. If, however, Respondent prevails in the dispute, deadlines directly affected by the matters in dispute shall be extended for a period of time equal to the time taken to resolve the dispute under the procedures of this Section, plus reasonable time for remobilization, as determined by EPA.

XVI. FORCE MAJEURE

69. Respondent agrees to perform all requirements under this Consent Order within the time limits established under this Consent Order, unless the performance is delayed by a <u>force majeure</u>. For purposes of this Consent Order, a <u>force majeure</u> is defined as any event arising from causes beyond the control of Respondent or of any entity controlled by Respondent, including but not limited to

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its contractors and subcontractors, that delays or prevents performance of any obligation under this Consent Order despite Respondent's best efforts to fulfill the obligation. Force majeure does not include financial inability to complete the work or increased cost of performance.

- 70. Respondent shall notify EPA orally within twenty-four (24) hours after Respondent becomes aware of the event, and in writing within three (3) days after Respondent becomes aware of any event which constitutes a <u>force majeure</u>. Such notice shall: (i) identify the event causing the delay or anticipated delay; (ii) estimate the anticipated length of delay, including necessary demobilization and re-mobilization; (iii) state the measures taken or to be taken to minimize the delay; and (iv) estimate the timetable for implementation of the measures. Respondent shall take all reasonable measures to avoid and minimize the delay. Failure to comply with the notice provision of this Section may, as reasonably determined by EPA, waive any claim of <u>force majeure</u> by the Respondent.
- 71. If EPA determines that a delay in performance of a requirement under this Consent Order is or was attributable to a force majeure, the time period for performance of that requirement will be extended as deemed necessary by EPA. Such an extension shall not alter Respondent's obligation to perform or complete other tasks required by the Consent Order which are not directly affected by the force majeure.

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- XVII. STIPULATED/STATUTORY PENALTIES

- 72. Unless there has been a written modification of a compliance date by EPA or an excusable delay as defined under Section XVI (Force Majeure), if Respondent fails to meet any requirement of this Consent Order, Respondent shall pay stipulated penalties as set forth below. Compliance by Respondent shall include completion of an activity under this Consent Order or any matter under this Consent Order in a manner acceptable to EPA, and within the specified time schedules in and approved under this Consent Order.
 - a. For failure to complete the Work in the time period or the manner required hereunder:
 - i. \$200 per day for the first through thirtieth days of noncompliance; and
 - ii. \$500 for the thirty-first day and each succeeding day of noncompliance thereafter.
 - b. For failure to submit a progress report as called for in Section VII above, or the final report as called for in Section VIII above in the time period or manner required hereunder:
 - i. \$100 per day for the first through thirtieth days of noncompliance; and
 - ii. \$250 per day for the thirty-first day and each succeeding day of noncompliance thereafter.
- 73. All penalties shall begin to accrue on the date that complete performance is due or a violation occurs and shall

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continue to accrue through the final day of correction of the noncompliance. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Order.

- 74. All penalties owed under this Section shall be due within thirty (30) days of receipt by Respondent of a written demand by EPA for payment thereof. Interest shall begin to accrue on the unpaid balance at the end of this thirty (30) day period. Interest will accrue on the unpaid balance until such penalties and interest have been paid in full and will be compounded annually.
- 75. All penalties shall be made by certified or cashier's check made payable to "EPA Hazardous Substance Superfund" and shall include the Site name, the EPA Site identification number SJ, the EPA Docket Number assigned to this matter, and shall reference that they are in payment of stipulated penalties and shall be remitted to:

Mellon Bank
Attn: Superfund Accounting
EPA Region VII
(Comptroller Branch)
Post Office Box 360748M
Pittsburgh, PA 15251

76. The stipulated penalties set forth in this Section do not preclude EPA from pursuing any other remedies or sanctions which may be available to EPA by reason of Respondent's failure to comply with any of the requirements of this Consent Order, nor shall payment of said penalties relieve Respondent of the responsibility to comply with this Consent Order. However, EPA will be precluded from seeking other judicial or administrative penalties for those

violations specified in this Section unless Respondent fails to pay penalties assessed pursuant to this Section.

77. Respondent is advised that, pursuant to Section 106(b) of CERCLA, 42 U.S.C. § 9606(b), any person who willfully violates or fails or refuses to comply with an order issued pursuant to that Section, without sufficient cause, may, in addition to an action brought in the appropriate United States District Court to enforce the order, be fined not more than \$25,000.00 for each day in which such violation occurs or such failure to comply continues. addition, pursuant to Section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3), any person who is liable for a release or threat of release of a hazardous substance and who fails without sufficient cause to provide properly the removal or remedial actions specified in an order issued pursuant to Section 106 of CERCLA may be liable to the United States for punitive damages in an amount equal to, and not more than three times the amount of any costs incurred by the United States as a result of such failure to take proper action.

XVIII. RESERVATION OF RIGHTS

78. Except as specifically provided in this Consent Order, nothing herein shall limit the power and authority of EPA or the United States to take, direct, or order all actions necessary to protect public health, welfare, or the environment or to prevent, abate, or minimize an actual or threatened release of hazardous substances, pollutants or contaminants, at, or from the Site. Further, except as provided in paragraph 76 hereof, nothing herein

shall prevent EPA from seeking legal or equitable relief to enforce the terms of this Consent Order, from taking other legal or equitable action as it deems appropriate and necessary, or from requiring the Respondent in the future to perform additional activities pursuant to CERCLA or any other applicable law. EPA reserves the right to bring an action against Respondent under Section 107 of CERCLA, 42 U.S.C. § 9607, for recovery of any response costs incurred by the United States related to this Consent Order or the Site and not reimbursed by Respondent.

XIX. OTHER CLAIMS

- 79. By issuance of this Consent Order, the United States and EPA assume no liability for injuries or damages to persons or property resulting from Respondent's acts or omissions. The United States or EPA shall not be deemed a party to any contract entered into by Respondent or its directors, officers, employees, agents, successors, representatives, assigns, contractors, or consultants in carrying out actions pursuant to this Consent Order.
- 80. Nothing in this Consent Order constitutes a satisfaction of or release from any claim or cause of action against any person not a party to this Consent Order, for any liability such person may have under CERCLA, other statutes, or the common law, including but not limited to any claims of the United States for costs, damages and interest under Sections 106(a) and 107(a) of CERCLA, 42 U.S.C. §§ 9606(a) and 9607(a).
- 81. This Consent Order does not constitute a preauthorization of funds under Section 111(a)(2) of CERCLA, 42 U.S.C. § 9611(a)(2).

Respondent waives any claim to payment under Sections 106(b), 111, and 112 of CERCLA, 42 U.S.C. §§ 9606(b), 9611, and 9612, against the United States or the Hazardous Substance Superfund arising out of any action performed under this Consent Order.

82. No action or decision by EPA pursuant to this Consent Order shall give rise to any right to judicial review except as set forth in Section 113(h) of CERCLA, 42 U.S.C. § 9613(h).

XX. <u>INDEMNIFICATION</u>

83. Respondent agrees to indemnify, save and hold harmless States, its officials, agents, contractors, the United subcontractors, employees and representatives from any and all claims or causes of action arising from, or on account of, acts or omissions of Respondent, Respondent's officers, directors, employees, agents, contractors, successors or assigns, in carrying out actions pursuant to this Consent Order; and for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between Respondent and any person for performance of work on or relating to the Site, including claims on account of construction delays. In addition, Respondent agrees to pay the United States all costs incurred by the United States, including litigation costs arising from or on account of claims made against the United States based on any of the acts or omissions referred to in this paragraph.

XXI. COMPLIANCE WITH OTHER LAWS

84. Respondent shall perform all actions required pursuant to this Consent Order in accordance with all applicable local, state,

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and federal laws and regulations except as provided in CERCLA Section 121(e) and 40 C.F.R. § 300.415(i). In accordance with 40 C.F.R. § 300.415(i), EPA has determined that all on-site actions required pursuant to this Consent Order, to the extent practicable, and considering the exigencies of the situation, attain applicable or relevant and appropriate requirements ("ARARS") under federal environmental or state environmental or facility siting laws.

XXII. MODIFICATIONS

- 85. This Consent Order may be amended by mutual agreement of EPA and Respondent. Amendments shall be in writing and shall be effective when signed by EPA.
- 86. No informal advice, guidance, suggestion, or comment by EPA regarding reports, plans, specifications, schedules, or any other writing submitted by the Respondent shall relieve Respondent of its obligation to obtain such formal approval as may be required by this Consent Order, and to comply with all requirements of this Consent Order unless it is formally modified.

XXIII. COVENANT NOT TO SUE

87. Except as otherwise specifically provided in this Consent Order, upon issuance of the EPA notice referred to in Section XXVI (Termination and Satisfaction) below, EPA covenants not to sue Respondent for judicial imposition of damages or civil penalties or to take administrative action against Respondent for any failure to perform the work required by this Consent Order except as otherwise reserved herein.

- 88. Except as otherwise specifically provided in this Consent Order, in consideration and upon Respondent's payment of EPA's costs as specified in Section XIV of this Consent Order, EPA covenants not to sue or to take administrative action against Respondent pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), for recovery of any past or future response costs incurred by the United States in connection with this removal action or this Consent Order or any cost incurred by EPA Region VII with regard to this Site prior to April 4, 1995. This covenant not to sue shall take effect upon the receipt by EPA of all payments required by Section XIV (Reimbursement of EPA's Costs).
- 89. These covenants not to sue are conditioned upon the complete and satisfactory performance by Respondent of its obligations under this Consent Order. These covenants not to sue extend only to Respondent and do not extend to any other person.

XXIV. CONTRIBUTION PROTECTION

90. With regard to claims for contribution against Respondent for matters addressed in this Consent Order, EPA and Respondent agree that Respondent is entitled to protection from contribution actions or claims to the extent provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4). Nothing in this Consent Order precludes the United States or Respondent from asserting any claims, causes of action or demands against any persons not parties to this Order for indemnification, contribution, or cost recovery.

XXV. EFFECTIVE DATE AND SEVERABILITY

- 91. The effective date of this Consent Order shall be the date that it is signed by EPA.
- 92. If a court issues an order that invalidates any provision of this Consent Order or finds that Respondent has sufficient cause not to comply with one or more provisions of this Consent Order, EPA and Respondent shall remain bound to comply with all provisions of this Consent Order not invalidated or determined to be subject to a sufficient cause defense by the court's order.

XXVI. TERMINATION AND SATISFACTION

- 93. This Consent Order shall terminate when Respondent demonstrates in writing and certifies to EPA that all activities required under this Consent Order including any additional work, the payment of Past and Future Response Costs, and any stipulated penalties demanded by EPA have been performed and EPA has approved the certification. EPA will make it a goal to approve or disapprove the certification within ninety (90) days of its receipt. If EPA disapproves the certification, it will specify in writing the reasons therefor. Termination of this Consent Order shall not, however, terminate Respondent's obligation to comply with Sections XII (Record Preservation), XVIII (Reservations of Rights), XX (Indemnification), and XXI (Compliance With Other Laws) of this Consent Order.
- 94. The certification shall be signed by a corporate official of Respondent who is in charge of a principal business function.

 Such representative shall make the following attestation: "I

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certify that the information contained in or accompanying this certification is true, accurate, and complete."

> PACIFIC ACTIVITIES, LTD., an Illinois corporation

May 17, 1995

CE PRESIDENT

May 24, 1995

Assistant Regional Counsel

U.S. Environmental Protection Agency

Region VII

IT IS SO ORDERED

/, 1995

Director | Superfund Division

U.S. Environmental Protection Agency

Region VII